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Supreme Court, U.S.
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No. 97-68

In the
Supreme Court of the United States

OCTOBER TERM 1997

WESTOWNE SHOES, INC.
AND CARL A. BIWER CO.,

Petitioners,

v.

BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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While predictably characterizing the court of appeals' decision as "thoughtful and careful," "well-reasoned" and "efficient," respondents ignore the Court's failure to address petitioners' primary breach of contract claim and its impermissible factfinding on a material, genuine issue. Instead, respondents attempt to continue in this court the same confusion that frustrated petitioners' jury trial and appeal rights below.

I. Independent of the Earlier, Underlying Dealership Agreement which the Court of Appeals Found Lacking in Specific Terms, the Critical 1987 Purity Agreement Not Addressed by the Court Was Specific in Its Terms and Established by Both the Writings and Statements of the Parties.

Respondents' brief in opposition, at page 9, asserts the court of appeals "explicitly addressed the Petitioners' contract law claims in its opinion and found them deficient." But the Court's opinion, including the portion quoted by respondents, shows the Court examined only the underlying dealership agreement, found it lacking in specific enforceable terms and held that under the dealership agreement, Brown was free to insist on "purity" as a condition for continuing as a Naturalizer dealer. That the Court mistakenly assumed Westowne's contract claim was based on an alleged wrongful imposition of purity is clearly shown by the court's own language:

> Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of losing its Naturalizer

> dealership (that is, the right to represent its stores as Naturalizer dealers) or replacing the SAS shoes that it carried with inferior knock-offs. . . . Westowne's argument is that the course of dealing between the parties, not any written contract, gave Westowne a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose unreasonable conditions on the retention of the dealership, such as requiring the dealer to carry a substandard product.

App. A at 3-4. The court acknowledged the imposition of purity combined with substandard product entitled Westowne to a remedy under the Wisconsin Fair Dealership Law (Wisconsin Statutes Chapter 135) and assumed because that remedy was time-barred, Westowne made its breach of contract claim as "a transparent evasion of the statute of limitations in the Dealership Act." App. A at 4.

If Brown had timely disclosed its inability to produce the SAS-type casual shoes and its decision to drop that product line, though continuing to insist on purity, Westowne would and would have pursued a Fair Dealership claim. App. J at 112. The fact Westowne had but did not pursue such a claim does not preclude a timely, common law breach of contract claim. Wisconsin's Fair Dealership law specifically provides that the rights thereunder are in addition to a dealer's remedies at common law. Wis. Stats. § 135.025(2)(c). The point of this petition, ignored by respondents, is that whether or not Westowne, like other dealers, had enforceable contract rights under their initial dealership agreements with Brown, there occurred in 1987 a specific contract modifying the earlier dealership agreement

which had permitted the dealers to sell casual shoes supplied by manufacturers other than Brown. In its June 11, 1987 "purity" letter, particularly as supplemented by its 1987 catalog, price list and buying guide and by specific oral statements from representatives of Brown management, Brown offered to produce and supply to Westowne, by a specific date in the following season, three identified styles of SAS-type comfort casual shoes in exchange for Westowne's agreement to eliminate from its inventory casual shoes manufactured by SAS by March 1, 1988. Both orally and by letter dated September 18, 1987, Westowne accepted this offer and agreed to eliminate its SAS shoes by the March 1, 1988 deadline, and to replace them with Naturalizer's Grenada, Russet and Utah series, the SAS-type comfort casuals Brown said it could and would supply. Westowne performed by eliminating SAS shoes. Brown did not perform. It could not and did not produce and supply a merchantable comfort casual shoe. While assuring Westowne and other dealers it was working out its problems, Brown decided to abandon its effort to produce the shoes and discontinued its comfort casual series. Still Brown insisted that Westowne remain "pure" as a condition for continuing as a Naturalizer dealer. App. J at 113-17.

The court of appeals acknowledged there were issues of fact on whether Brown promised Westowne and other dealers it would produce and supply SAS-type comfort casual shoes and whether it made good on that promise. App. A at 3. But the Court failed to address Brown's dropping the comfort casual line as a breach of contract because the Court did not address the contract alleged to have been breached. Instead of addressing petitioners' cause of action pleaded and pursued both in the district court and court of appeals (the breach of Brown's 1987 agreement to supply casual shoes in

exchange for Westowne's agreement to drop SAS shoes), the Court insisted petitioners were merely pursuing a claim over purity as a violation of the underlying dealership agreement which petitioners could have pursued earlier under the Wisconsin Fair Dealership Act, but cannot pursue as a matter of contract. Respondents' brief in opposition would continue into this court the confusion of plaintiffs' legitimate contract claim with an untimely claim under the Fair Dealership Act, thus continuing the frustration of petitioners' right to appeal on an issue properly raised and presented in the court of appeals.

Petitioners do not quarrel with respondents' argument and authorities in their brief in opposition at pages 10-11 that only significant and dispositive arguments on appeal must be addressed by the court. But one of petitioners' causes of action was based primarily on Brown's failure to supply casual shoes after promising Westowne it would do so in exchange for Westowne's agreement to go pure by eliminating SAS shoes. This claim was clearly alleged in the petitioners' complaint. App. I at 80-83, 85-87. In the court of appeals, petitioners raised, presented and developed as a primary appeal issue the district court's failure to recognize genuine, material issues of fact on this claim. App. K at 132-37, 147-53. Given the court of appeals' acknowledgement of the evidence Brown promised the SAS-type casual shoes, that Westowne then eliminated SAS shoes in favor of the Naturalizer versions it had been promised and that Brown did not supply the promised shoes, it is clear that had the Court addressed the mutual promises in 1987 as a separate contract, a contract which, under Wisconsin law, would be enforceable even in a dealership relationship

terminable at will,[1] the outcome of this case would have been different, at least in the sense that the evidence presented would have been regarded as requiring a trial so that summary judgment was not warranted.

II. The Court of Appeals' Finding, Contrary to the Record, that Westowne Would Have Eliminated SAS Shoes Even Without Brown's Promises and Misrepresentations, Constituted Impermissible Factfinding on Genuine, Material Issues.

Respondents' argument and authorities on this issue, brief in opposition at 12-17, demonstrate only the obvious: that issues of fact precluding summary judgment must be material and genuine and that in many instances the courts do reverse summary judgments. But respondents miss the point of the reason for granting certiorari related to this issue. Despite the proper application of summary judgment guidelines by some courts, there is a legitimate concern on the part of courts and writers that since this court's "1986 triology of summary judgment cases" there is a "drift in many areas of federal litigation toward substituting summary judgment for trial." *See* series of excerpts from court decisions and authorities cited in petition at 21-25.

The court of appeals' impermissible factfinding in this case illustrates the problem. Despite evidence in the record, cited by petitioners in the court of appeals, that Westowne would not have agreed to purity if it had known about

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[1] *See* authorities cited on this issue in Westowne's petition for rehearing in the court of appeals, App. L at 177-79.

Naturalizer's inability to produce a merchantable casual shoe (App. J at 112), the court of appeals found Westowne would have gone pure even in the absence of Brown's promises to supply an SAS substitute and even if Brown had disclosed its problems in producing them. It was based on this erroneous finding of fact that the Court concluded the acknowledged promises and misrepresentations "made no difference" and thus affirmed the dismissal of the promissory estoppel and misrepresentation claims. App. A at 6-7. From the court of appeals' own language, its factfinding was on a material issue. Petitioners' cited evidence Westowne would not have gone pure in the absence of Brown's promises and misrepresentations demonstrates the genuiness of that issue. This same evidence effectively replies to respondents' contention in their brief, at page 16, that the court of appeals' finding the promises and misrepresentations neither induced the petitioners to act nor caused them harm, was merely a "legal conclusion based upon the undisputed facts."

CONCLUSION

Certiorari should be granted to restore petitioners' jury trial and appeal rights and to discourage the deprivation of those rights in other cases.

Respectfully submitted,

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